BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

OCT 13 1998

In the Matter of	)	
	)	
Carriage of the Transmissions	)	CS Docket No. 98-120
of Digital Television Broadcast Stations	)	
	)	
Amendments to Part 76	)	
of the Commission's Rules	)	

COMMENTS OF

ADELPHIA COMMUNICATIONS CORPORATION
ARIZONA CABLE TELECOMMUNICATIONS ASSOCIATION
INSIGHT COMMUNICATIONS COMPANY, L.P.
SUBURBAN CABLE TV CO. INC.
MEDIACOM LLC
PRIME COMMUNICATIONS--POTOMAC, LLC
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Dated: October 13, 1998

TABLE OF CONTENTS

SUMMARY

The present NPRM requests comment on seven proposals regarding the carriage of digital television (sometimes referred to herein as "DTV") stations during the transition period from analog to digital broadcasting. Six of the seven proposals would mandate the carriage of DTV stations at some point during the transition period. The seventh proposal, "no must-carry," would instead allow broadcasters and cable operators to negotiate for the voluntary carriage of digital broadcast signals through retransmission consent agreements. This proposal, in tandem with the resolution of outstanding digital compatibility issues, is best suited to serve the Commission's goal of facilitating the transition from analog to digital broadcasting.

The Commission lacks statutory authority to require cable operators to carry both digital and analog broadcast signals during the transition period under Section 614(b)(4)(B) of the Communications Act (the "Act"). This provision authorizes the Commission to regulate the carriage of broadcast stations "which have been changed to conform to" DTV format. This change will not be made until the end of the transition period when all analog spectrum has been returned to the Commission. Thus, the imposition of any mandatory carriage requirement during the transition period is beyond the authority of the Commission.

Likewise, the Balanced Budget Act of 1997 provides no support for the imposition of transitional must-carry rules. Amended Section 309(j) of the Act allows the Commission to extend the December 31, 2006, DTV transition deadline in Designated Market Areas ("DMAs") where 15% or more of the television households do not subscribe to a multichannel video programming distributor ("MVPD") carrying one of the digital broadcast stations operating in that DMA. Further, Section 309(j) requires broadcast stations in a DMA where no cable system carries *any* DTV signals to surrender one of their channels to the Commission if at least 85% of

the households in the DMA have a digital or digital-compatible receiver. Congress clearly anticipated that some cable operators might not carry all or even *any* of the digital broadcast stations in their DMA.

Congress' requirement in Section 614(b)(3) of the Act that cable operators retransmit the "primary video" of local commercial television stations carried on their system refers solely to the analog signal of such stations. Throughout the transition period, it will be analog television signals which will be received and watched by a majority of the viewing audience. Even assuming that the Commission has the authority to require carriage of digital broadcast signals during the transition period, that authority would be limited under Section 614(b)(5) of the Act to those signals (1) which do not substantially duplicate the programming broadcast on associated analog signals, or (2) which are not broadcast by a licensee affiliated with any broadcast network.

Transitional must-carry rules for DTV signals also raise First Amendment concerns in that they would require channel-locked cable operators to drop some existing cable programming services. Digital must-carry rules would fail the intermediate scrutiny analysis applied to their analog counterparts in Turner Broadcasting System, Inc. v. FCC ("Turner"). The existence of analog must-carry requirements have furthered the interests articulated by Congress, *i.e.*, the preservation of broadcast television, the widespread dissemination of information from a multiplicity of sources, and the promotion of fair competition in the television programming market. Mandatory carriage of a second set of broadcast signals, particularly ones which will become increasingly identical in content to existing analog signals, is not necessary to further Congress' interests. In fact, requiring cable operators to replace existing cable programming with

a duplicative digital broadcast signal will impede the dissemination of information from a multiplicity of sources.

The significant burden which would be imposed on cable operators through the creation of DTV must-carry rules is disproportional to the interests involved. All cable operators would lose editorial discretion over the creation of programming packages and reduce the number of channels over which they exercise control. Cable programmers would in turn face increased competition when seeking carriage on any remaining open channels. Given their limited resources, many small cable operators would be particularly burdened if forced to eliminate the Headend in the Sky technology which allows them to carry six digitally compressed services on one 6 MHz channel.

Several alternatives exist which would be better tailored to meet the Commission's goal of promoting the transition to digital television. For example, allowing cable operators and broadcasters to privately negotiate retransmission consent agreements would result in the voluntary carriage of DTV signals on mutually agreeable terms. Past history in the analog context has demonstrated that, if given the opportunity, most broadcasters would elect retransmission consent over mandatory carriage. To the extent that consumer electronics manufacturers fail to include input selection features on digital receivers in the future, the Commission could mandate their inclusion under the All-Channel Receiver Act. Similar action was successfully taken during the 1960's to ensure the production of analog television sets capable of receiving UHF signals. The existence of these narrowly-tailored alternatives demonstrate that transitional DTV must-carry rules would not withstand First Amendment scrutiny under Turner.

The emphasis on digital must-carry in the NPRM is misplaced in light of the fact that the resolution of outstanding digital compatibility issues is a necessary prerequisite to the imposition

of mandatory carriage rules. The success of the transition from analog to digital television depends more on the willingness of the viewing public to invest in new technology than on the existence of transitional digital must-carry rules. All television viewers, regardless of whether they subscribe to cable television services, will need to purchase either a brand-new digital receiver or a set-top box to view digital programming on their analog receiver. The failure of consumer electronics manufacturers to make the first generation of DTV receivers capable of processing cable-generated quadrature amplitude modulation ("QAM") signals or to include a "Fire Wire" will further increase the transitional cost to cable subscribers. Unless the Commission creates industry standards requiring digital receivers to be QAM-compatible and to include a "Fire Wire," cable subscribers will be angered at the additional cost they will incur when forced to purchase an additional set-top box in order to view cable programming on their digital receiver.

Unlike must-carry, retransmission consent is a statutorily permissible means of facilitating the transition to digital television. Section 325(3)(A) of the Act allows the conclusion of retransmission consent agreements with respect to commercial "television broadcast stations" generally. Retransmission consent also provides incentives for digital broadcasters and cable operators to negotiate voluntary carriage early in the transition period, such as agreements which allow cable operators to retransmit digital signals in more bandwidth-efficient formats.

In contrast, the imposition of a digital must-carry requirement prior to the end of the transition period eviscerates the very notion of a transition. Throughout this period, broadcasters will have the free use of a second channel to increasingly simulcast their analog programming in digital format. Consumers will use both analog and digital technology until the very end of the transition in order to maximize the usefulness of their existing analog equipment. The pace of the

conversion from analog to digital will thus be dictated by the marketplace and by consumer choice. Any carriage rules which the Commission adopts in this proceeding should be aimed at facilitating this marketplace conversion by providing incentives for cable operators to upgrade their plant and retransmit digital broadcast signals where economically justified. Such incentives could include exemptions from syndicated exclusivity, network nonduplication and sports blackout rules or a relaxation of the rule prohibiting "cherry picking" of local broadcast stations.

Other issues which the Commission should consider in this proceeding include: (1) creating incentives for small cable systems and their operators to voluntarily carry DTV signals during the transition in light of their financial limitations; (2) the inapplicability of the current definition of "capacity" under the Commission's rules in a digital environment; (3) that the alteration of a broadcast signal's digital format generally does not constitute a material degradation of that signal; (4) granting cable operators flexibility in choosing the tier position of digital broadcast stations; (5) that the availability and reliability of input selection devices eliminates the need for mandatory DTV carriage rules; (6) that FCC preemption of local governmental and private restrictions relating to rooftop antennas facilitates the off-air reception of television broadcast signals; and (7) that rate incentives, including the creation of a new digital tier, will encourage cable operators to conclude retransmission consent agreements during the transition period.

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COMMENTS OF ADELPHIA COMMUNICATIONS CORPORATION; ARIZONA CABLE TELECOMMUNICATIONS ASSOCIATION; INSIGHT COMMUNICATIONS COMPANY, L.P.; SUBURBAN CABLE TV CO. INC.; MEDIACOM LLC; PRIME COMMUNICATIONS--POTOMAC, LLC; AND TELE-MEDIA CORPORATION

Adelphia Communications Corporation; Arizona Cable Telecommunications Association; Insight Communications Company, L.P.; Suburban Cable TV Co. Inc.; Mediacom LLC; Prime Communications--Potomac, LLC; and Tele-Media Corporation (collectively, the "Joint Commenters"), by their attorneys, hereby respectfully submit these comments in response to the above-captioned Notice of Proposed Rulemaking, released by the Federal Communications Commission ("Commission" or "FCC") on July 10, 1998.[1] The Joint Commenters include operators of cable television systems across the nation and a state-wide trade association representing cable operators, and thus have a direct interest in any rules the Commission adopts pertaining to the mandatory carriage of transmissions of digital television (sometimes referred to

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[1] Carriage of the Transmissions of Digital Television Broadcast Stations, Notice of Proposed Rulemaking, CS Docket No. 98-120, FCC 98-153 (rel. July 10, 1998) ("NPRM").

herein as "DTV") broadcast stations over cable systems during the transition period from analog to digital broadcasting.

I. Introduction

In February, 1998, the Commission adopted an order modifying and finalizing DTV channel assignments that were made in 1997. These DTV channel assignments were made to facilitate the conversion of over-the-air television broadcasting from analog to digital signals.[2] Specifically, the Recon. of Sixth R&O affirmed the Commission's approach of providing all eligible broadcasters with a second channel that, to the extent possible, will allow them to replicate the coverage of their existing analog signal.[3] The Commission also affirmed its plans for spectrum recovery, and for maintaining the secondary status of low power stations.[4]

The Commission further established certain rules pertaining to the "transition period," during which time broadcasting would be moving from analog to digital technology. The Commission assigned each local broadcast station a DTV channel, in addition to the analog channel over which it was already broadcasting, but declined to adopt a simulcast requirement for the early years of the transition period.[5] Instead, the Commission adopted a requirement of 50% simulcasting of the video programming of the analog channel on the DTV channel by the sixth year from the date of adoption of the Fifth Report and Order; a 75% simulcasting requirement by

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[2]See Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, MM Docket 87-268, 13 FCC Rcd 7418, ¶ 26 (1998) ("Recon. of Sixth R&O").

[3]Id.

[4]Id.

[5]Fifth Report and Order, MM Docket 87-268, 12 FCC Rcd 12809, ¶ 54 (1997).

the seventh year; and a 100% simulcasting requirement by the eighth year, until all analog broadcasts are terminated and one of the broadcaster's two 6 MHz channels is returned to the Commission.[6] The simulcasting requirement in the later years of the transition period will "help ensure that consumers will enjoy continuity of free over-the-air program service when [the Commission] reclaim[s] the analog spectrum at the conclusion of the transition period."[7]

This effort to change television broadcasting from analog to digital technology has brought to the forefront the issue of whether cable operators should, or can, be required to carry both the digital and analog signals of broadcast stations during the transition period. While the present NPRM proposes several variations of digital must-carry during the transition period, the Commission itself admits that such rules may not even be necessary to assure the carriage of digital signals over cable systems during such period.[8] Specifically, the Commission noted that

> approximately 80 percent of commercial television broadcasters elected retransmission consent on some cable systems, rather than must carry, during the 1993-1996 election cycle. Thus, assuming this information is accurate, the question arises as to whether the general pattern will be repeated with respect to digital broadcast television stations during the transition period. . . If it is repeated, . . . it is possible that many of the transitional issues involved in this proceeding

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[6]Id. The simulcasting requirements will be a subject of review every two years until the cessation of analog service. See Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order, MM Docket 87-268, 13 FCC Rcd 6860, ¶ 41 (1998) ("Recon. of Fifth R&O").

[7]Fifth Report and Order, ¶ 56. The Commission set a target date of December 31, 2006 for the complete conversion to digital broadcast and the cessation of analog service. Id., ¶ 99. At the designated date, broadcasters who do not receive extensions must return one of their two channels to the Commission. Id., ¶ 100. However, as discussed in part II.A. of these comments, *infra*, extensions will be available to broadcasters in any market where, *inter alia*, 85 percent of the households either do not subscribe to cable or other multichannel services that carry all locally available digital broadcast signals, or have at least one television set in their homes equipped to receive digital broadcast services. See 47 U.S.C. § 309(j)(14)(B)(iii) (as amended, 1997).

[8]See NPRM, ¶ 33.

> will be resolved through retransmission consent negotiations. Also, if the general retransmission consent pattern is repeated, the digital television stations scheduled to begin broadcasting in November 1998, May 1999, and November 1999, are most likely to exercise retransmission consent for the third election cycle currently scheduled to commence on January 1, 2000, even if there were digital must carry requirements in place.[9]

For this and other reasons set forth herein, the Joint Commenters submit that mandatory carriage requirements for digital signals during the transition period are unwarranted, especially in light of the serious statutory and constitutional concerns related to the adoption of such rules.

II. The Commission Does Not Have Statutory Authority To Require Cable Operators To Carry Both Digital And Analog Television Broadcast Signals During The Transition Period.

A. The Commission lacks statutory authority to implement transition period digital must-carry rules under Section 614(b)(4)(B).

The Commission asserts that "[t]he statutory provision triggering this rulemaking is found in Section 614(b)(4)(B),"[10] which provides as follows:

> [a]t such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations *which have been changed* to conform with such modified standards.[11]

This provision, however, does not give the Commission statutory authority to implement rules regarding the forced carriage of commercial DTV signals *during the transition period* from analog to digital. The legislative history of this provision specifically provides that

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[9]NPRM, ¶ 33 (footnotes omitted).

[10]NPRM, ¶ 2.

[11]47 U.S.C. § 534(b)(4)(B) (emphasis added).

> [t]he issue of 'advanced television' is addressed in subsection (b)(4)(B). The Committee recognizes that the Commission may, in the future, modify the technical standards applicable to television broadcast signals. In the event of such modifications, the Commission is instructed to initiate a proceeding to establish technical standards for cable carriage of such broadcast signals *which have been changed* to conform to such modified signals.[12]

Thus, Congress has only authorized the Commission to establish rules requiring the carriage of DTV signals *after* a broadcast station has fully transitioned from analog to digital, and has returned its analog spectrum to the Commission for auction. This situation will not exist during the transition period, because broadcasters are not required to return their analog channels until the end of the transition period.

Of the Commission's seven must-carry proposals,[13] six of them would impose some form of carriage requirements during the transition period.[14] The Commission simply does not have authority under Section 614(b)(4)(B) to enact any of its first six proposals. The Commission has explained that during the transition period, "both the analog and digital television signals will be broadcast."[15] Stations that are broadcasting both analog and digital signals during the transition

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[12]H.R. Rep. No. 628, 102d Cong., 1st Sess. 94 (1992) ("House Report") (emphasis added); see also H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 67 (1992); S. Rep. No. 92, 102d Cong., 1st Sess. 85 (1991) ("Senate Report); NPRM, n.1.

[13]See NPRM, ¶¶ 41-50.

[14]Only the last proposal, the "no must-carry proposal," would not require carriage of DTV stations during the transition period. See NPRM, ¶ 50. The "no must-carry proposal" simply allows the preservation of the *status quo*, during which time retransmission consent would still apply, and broadcasters and cable operators would thus be free to enter into voluntary carriage negotiations for digital signals. See id.

[15]NPRM, ¶ 9.

period will not be "changed to conform" to the Commission's modified DTV standards until the transition period has ended, and the analog spectrum has been returned to the Commission.[16]

B. The Commission lacks statutory authority to implement transition period digital must-carry rules under the Balanced Budget Act of 1997.

The NPRM's further attempt to justify establishing DTV must-carry rules during the transition period under the Balanced Budget Act of 1997[17] is misplaced as well.[18] Contrary to the NPRM, the Balanced Budget Act of 1997 contains language confirming that Congress did *not* intend DTV must-carry requirements to apply during the transition period. In fact, in amending Section 309(j) of the Communications Act, Congress relaxed the requirement that broadcasters complete their transition to DTV, cease transmitting on their analog channel, and return one channel to the Commission for auction by December 31, 2006. Congress granted the Commission discretion to extend this deadline if it finds that any of three specified conditions are satisfied, the third of which reads as follows:

> (iii) in any market in which . . . 15 percent or more of the television households in such market --
>
> (I) do not subscribe to a multichannel video programming distributor (as defined in section 602) that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market; and
>
> (II) do not have either --

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[16]See id.

[17]Pub. L. No. 105-33, 111 Stat. 251 (1997) (amending, *inter alia*, Section 309(j) of the Communications Act).

[18]See NPRM, ¶ 13.

> (a) at least one television receiver capable of receiving the digital television service signals of the television stations licensed in such market; or
>
> (b) at least one television receiver of analog television service signals equipped with digital-to-analog converter technology capable of receiving the digital television service signals of the television stations licensed in such market.[19]

It is clear from the language of this provision that Congress did not contemplate cable systems being required to carry DTV signals during the transition period. The fact that Congress chose to modify the phrase "do not subscribe to a multichannel video programming distributor" with the language "that carries one of the digital television service programming channels of each of the television stations broadcasting such a channel in such market"[20] is evidence that Congress recognized that a cable operator might choose not to carry every DTV signal broadcasting in its Designated Market Area ("DMA"). The modifying language would be nothing more than unnecessary verbiage if Congress had actually intended for must-carry obligations to attach to DTV signals during the transition period. To interpret this provision as a broad grant of authority to "define the scope of a cable operator's signal carriage requirements during the period of change from analog to digital broadcasting"[21] is an implausible stretch.

Moreover, the plain language of Section 309(j)(14)(B)(iii) provides that, in order to extend the deadline of the transition period, *both* subsections (I) and either (II)(a) or (b) must be satisfied. This means that even stations in a DMA where *no* cable system carries *any* DTV signals

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[19]47 U.S.C. § 309(j)(14).

[20]47 U.S.C. § 309(j)(14)(B)(iii)(I).

[21]NPRM, ¶ 13.

will have to surrender one of their channels by December 31, 2006, if at least 85 percent of the television households in that DMA have at least one digital television set or one analog television set that is equipped with a digital/analog converter. This language shows that Congress did not even consider that mandatory carriage of DTV signals was required in order to achieve transition to digital broadcasting. In fact, contrary to the NPRM,[22] the plain language of the statute shows that Congress determined that the transition to DTV could be considered successful based solely on the percentage of television households electing to equip their analog television sets with an analog/digital converter, without even having the ability to view television programs on a digital television set.

C. The Commission lacks statutory authority to implement transition period digital must-carry rules under Section 614(b)(3).

Section 614(b)(3) states that

> [a] cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers.[23]

If a broadcast licensee's analog and digital facilities are considered a single television station, the "primary video" referred to in this provision can only mean the broadcaster's analog signal. Until the close of the transition period when the existing analog spectrum is returned to the Commission, it will be analog television signals that are received and watched by most of the

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[22]See NPRM, ¶ 14 ("we believe that the participation by the cable industry during the transition period is likely to be essential to the successful introduction of digital broadcast television").

[23]47 U.S.C. § 534(b)(3).

viewing audience. As explained in more detail in the following section, should the Commission deem analog and digital facilities to be separate broadcast stations, the statutory must-carry provisions would not require carriage of digital signals, as explained below, given the increasing amount of duplicative programming required to be simulcast by DTV stations during the transition period. In either circumstance, analog signals are the only "primary video" signals required to be carried on cable systems under Section 614(b)(3) during the DTV transition phase.

D. The Commission lacks statutory authority to implement transition period digital must-carry rules under Section 614(b)(5).

Even assuming that the Commission has the authority to prescribe rules mandating carriage of digital signals during the transition period, those rules could only apply to digital signals that:

- do not broadcast programming that substantially duplicates the programming broadcast by the licensee's analog signal, and
- are not broadcast by a licensee affiliated with any broadcast network.

Mandatory carriage of duplicative programming is not permitted under the must-carry provisions of the 1992 Cable Act. Specifically, the 1992 Cable Act provides that

> a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network.[24]

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[24] 47 U.S.C. § 534(b)(5).

Thus, a digital signal that is simply a simulcast of a broadcaster's existing analog signal "substantially duplicates"[25] the analog signal, and cannot be required to be carried under the must-carry provisions. Any attempt to evade this provision by requiring carriage of identical analog and digital signals during the transition period would be in direct contravention of Congress' intent.[26]

In those situations where the digital signal does not substantially duplicate the analog signal (*i.e.*, where different programming is offered over the two signals prior to the effective dates of the simulcasting requirements), digital must-carry still cannot be required under Section 614(b)(5), because a cable operator is not required "to carry the signals of more than one local commercial television *station* affiliated with a particular broadcast network."[27] A cable operator, therefore, cannot be required to carry the digital signals of any network-affiliated broadcaster under Section 614(b)(5) if the cable system already carries its analog signal.

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[25]"Substantially duplicated" is a term of art that "means that a station regularly simultaneously broadcasts the identical programming as another station for more than 50 percent of the broadcast week." 47 C.F.R. § 76.56(b)(5); see also House Report at 94. Simulcast analog and digital signals of the same broadcast station contain identical programming, and are, therefore, "substantially duplicated." While broadcasters may use their 6 MHz digital channel for purposes other than duplicating the programming on their analog channel, and in fact, will not be required to simulcast at least 50 percent of their analog programming on their digital channel until the year 2003 at the earliest (see Fifth Report and Order, ¶ 54), the Commission expects that broadcasters will, nevertheless, use their digital channel like their analog channel -- primarily for the provision of free over-the-air television service. See Recon. of Sixth R&O, ¶ 28. Thus, exact duplication of the programming contained on a broadcaster's analog channel is anticipated to be the most likely use of the digital channel also assigned to that broadcaster.

[26]See House Report at 94 ("[t]his provision is intended to preserve the cable operator's discretion while ensuring access by the public to *diverse* local signals" (emphasis added)); see also id. at 51; Senate Report at 85.

[27]47 U.S.C. § 534(b)(5) (emphasis added).

III. Rules That Require The Carriage Of Both Digital And Analog Television Broadcast Stations During The Transition Period Will Not Withstand First Amendment Scrutiny.

Seven carriage proposals were made in the NPRM, six of which effectively represent a variation on the must-carry theme.[28] Each of these six proposals anticipate that cable operators will have to commence carriage of digital broadcast stations, pursuant to regulation by the Commission, during the transition period.[29] For this reason, references herein to DTV "must-carry" and "mandatory carriage" are intended to encompass each of these six carriage proposals. Under any of these options, cable operators whose systems are channel-locked may have to drop existing cable programming services to accommodate the carriage of both the analog and digital signals of a broadcast station. But even for cable operators not forced to drop existing programming to accommodate DTV carriage, any mandatory carriage requirement would "reduce the number of channels over which cable operators exercise unfettered control, and [the rules] render it more difficult for cable programmers to compete for carriage on the limited channels remaining," and thus would raise substantial First Amendment concerns.[30]

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[28]NPRM, ¶¶ 41-50. As its name indicates, the "no must-carry proposal" avoids a mandatory carriage requirement.

[29]The "either-or" proposal would require broadcasters to choose between must-carry and retransmission consent for their digital and analog signals during the transition period. However, there can be little doubt that broadcasters would choose must-carry for their digital signals and then negotiate retransmission consent agreements for their analog signals. Since continued carriage of analog signals will continue to be necessary due to marketplace realities during the transition period, cable operators would be forced to carry both signals.

[30]See Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622, 636-37, 114 S. Ct. 2445, 2456 (1994). It is already well established that cable operators engage in and transmit speech that is entitled to First Amendment protection. Leathers v. Medlock, 499 U.S. 439, 444 (1991).

The Commission recognizes that, "given the history of the must-carry provisions and the litigation relating to them, . . . any rules adopted by the Commission must be carefully crafted to permit them to be sustained in the face of a constitutional challenge."[31] Specifically, any rules enacted pursuant to this rulemaking must fall within the constitutional limitations established in Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 117 S. Ct. 1174 (1997) ("Turner"), wherein the Supreme Court upheld the analog must-carry provisions of the 1992 Cable Act. In Turner, the Court determined that the analog must-carry requirements are consistent with the First Amendment because they further important government interests and do not burden substantially more speech than necessary to further those interests.[32] Thus, the analog must-carry provisions were deemed to meet the O'Brien intermediate scrutiny test for restricting content-neutral speech.[33] Any proposed DTV must-carry provisions must also meet the two parts of the O'Brien intermediate scrutiny test.[34] Unlike the analog must-carry provisions of the 1992 Cable Act narrowly upheld in Turner, any must-carry requirement for transitional DTV signals will not pass the O'Brien intermediate scrutiny test.

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[31]NPRM, ¶ 15.

[32]Turner, 117 S. Ct. at 1184.

[33]Id. (citing United States v. O'Brien, 391 U.S. 367 (1968)). The intermediate scrutiny test under O'Brien says that a content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech, and does not burden substantially more speech than necessary to further those interests. O'Brien, 391 U.S. at 377.

[34]The Commission acknowledges that, in light of the Turner decision, it must "build a record relating to the interests to be served by any digital broadcast signal carriage rules, the factual predicate on which they would be based, the harms to be prevented, and the burdens they would impose." NPRM, ¶ 16.

A. Congress has not articulated any important governmental interests that would be furthered by the carriage proposals in the NPRM.

In applying the O'Brien test to the must-carry provisions at issue in Turner, a mere plurality of the Court found that they were designed to serve three interrelated government interests: 1) preservation of the benefits of free, over-the-air local broadcast television; 2) promotion of widespread dissemination of information from a multiplicity of sources; and 3) promotion of fair competition in the market for television programming.[35] These interests were specifically enunciated by Congress when it passed the 1992 Cable Act.[36] In finding that these interests were sufficient to meet the first part of the O'Brien test as it applied to analog must-carry, the plurality opinion gave substantial deference to Congress' determination that these interests were important.[37]

Must-carry of *both* digital and analog broadcast signals during the transition period does not further the interests articulated by Congress in support of just analog must-carry.[38] Now that the analog must-carry provisions have been upheld, the benefits of free, over-the-air broadcast

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[35]Turner, 117 S. Ct. at 1186. Justice Breyer concurred with Justice Kennedy's application of the O'Brien intermediate scrutiny framework except for his competition analysis. Id. at 1203-05. Thus, only the "preservation of benefits" and the "information dissemination" interests found support among a majority of the Court. Justices O'Connor, Scalia, Thomas and Ginsburg dissented from the plurality opinion in its entirety. Id. at 1205-19.

[36]See House Report at 47, 50-52, 63-65; Senate Report at 41-43.

[37]See Turner, 117 S. Ct. at 1189-97.

[38]The interests identified by Congress and addressed in Turner, however, arguably might be used to justify the implementation of digital must-carry rules as a *replacement* for analog must-carry rules after the end of the transition period.

television have been preserved;[39] the widespread dissemination of information from a multiplicity of sources is being promoted; and fair competition for television programming has been secured. Mandatory carriage of a second set of broadcast signals during the transition period, most likely identical in content to the set of analog signals already being carried, is not necessary to further the interests served by analog must-carry rules. Thus, the push for DTV must-carry must be justified by new and important government interests that are unrelated to the suppression of free speech.

However, Congress has not articulated any interests that would be furthered by the adoption of digital must-carry rules that would apply in addition to the analog must-carry rules already in place. Thus, any governmental interests advanced by such digital must-carry rules must be identified by the Commission. The Commission's ability to establish important government interests that would be furthered by the implementation of digital must-carry rules that would place *double* the existing must-carry burden on cable operators is almost unimaginable given the Court's thorough analysis of this issue in Turner.

While the Commission has expressed some government interests that will allegedly be furthered by digital must-carry rules during the transition period,[40] the mere fact that any

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[39]The NPRM proffers that the very conversion to digital broadcasting may eliminate "some of the reception problems that made it difficult for certain consumers to receive over-the-air broadcast signals." NPRM, ¶ 16. Thus, forced carriage of DTV signals on cable systems may not even be necessary after the end of the transition period to preserve the benefits of free over-the-air broadcast television.

[40]See NPRM, ¶ 1 ("In proposing rules, we recognize a number of statutory goals. These include the successful introduction of digital broadcast television and subsequent recovery of the vacated broadcast spectrum, retention of the strength and competitiveness of broadcast television, a minimization of the disruption and costs to subscribers, cable operators, and cable programmers, (continued...)

government interests furthered by digital must-carry are identified by the Commission rather than by Congress makes court approval less likely.[41] The Turner Court determined that

> [w]e owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power. Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.[42]

Thus, unlike those of the Congress, any findings made by the Commission with regard to the enactment of nationwide regulatory policy may not be afforded such substantial deference, especially in light of Congressional silence on the subject.[43]

Any court analyzing the constitutionality of DTV must-carry provisions must also deal with the fact that "[a]n essential goal of the First Amendment is to achieve 'the widest possible dissemination of information from diverse and antagonistic sources.'"[44] Mandating the carriage of

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[40](...continued)
while not inhibiting investment and innovation in technologies and services. . . Overall, we want an efficient and orderly structure that implements the law in a manner that, to the extent possible, permits market forces and private agreements to resolve issues and also respects the First Amendment rights of all participants as established by court precedent."); see also id. at ¶ 41 (immediate carriage proposal would "provide assurance that investment in digital technology and programming will be fully realized").

[41]See Turner, 117 S. Ct. at 1189-97.

[42]Id. at 1189.

[43]Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 356 (D.C. Cir. 1998) (in order for the Commission to satisfy the substantial relation and narrow tailoring prongs of intermediate scrutiny analysis, empirical evidence is needed).

[44]Time Warner Entertainment Co., L.L.P. v. FCC, 93 F.3d 957, 975 (D.C. Cir. 1996) (quoting FCC v. Nat'l Citizens Comm. for Broadcasting, 436 U.S. 775, 799 (1978)).

two signals controlled by the same local broadcast station or broadcast network, and that might contain identical programming, undermines rather than furthers this goal. Under the current must-carry provisions, where a cable system has more than twelve usable activated channels, the cable operator must carry the signals of all local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.[45] Thus, where the mandatory carriage of broadcast stations' digital, as well as analog, channels does not fill more than one-third of the total usable activated channels on the cable system, the Commission is essentially mandating carriage of two signals offered by the same local broadcaster. If the cable operator carried the digital channel, and that channel were nothing more than a simulcast of the broadcaster's analog channel, the cable operator might have to drop some other channel of programming from its system (due to the physical limitations of total channel capacity on the system), thereby reducing the diversity of information carried over its system.[46] Even if the digital channel contained programming different from that on the analog channel, the cable operator would still be forced to drop some other channel of programming in order to carry two channels controlled by the same broadcaster. Indeed, as described in more detail, *infra*, small, channel-locked cable operators using Headend in the Sky ("HITS") technology could lose as many as six programming services if made to carry a single digital broadcast signal. Under any scenario,

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[45]47 U.S.C. § 534(b)(1)(B).

[46]See NPRM, ¶¶ 39 (under a digital must-carry requirement, "cable operators could be required to carry double the amount of television stations, that will eventually carry identical content, while having to drop various and varied cable programming services where channel capacity is limited").

therefore, simultaneous analog and digital must-carry rules do not further the First Amendment goal of promoting the widest possible dissemination of information from a diversity of sources.

B. Simultaneous analog and digital must-carry is overly burdensome on cable operators' speech.

If a court were to find that there are important government interests that would be furthered by the imposition of DTV must-carry provisions, then it must determine that such provisions are sufficiently tailored to further those interests, and do not burden substantially more speech than necessary.[47] The Turner Court has already acknowledged that

> [t]he must-carry provisions have the potential to interfere with protected speech in two ways. First, the provisions restrain cable operators' editorial discretion in creating programming packages by 'reduc[ing] the number of channels over which [they] exercise unfettered control.' Second, the rules 'render it more difficult for cable programmers to compete for carriage on the limited channels remaining.'[48]

Transitional DTV must-carry is an added burden to that already imposed by analog must-carry -- double that considered in Turner.

While all cable operators would be burdened under the NPRM's carriage proposals, small cable systems, particularly those owned by small cable operators, would face considerable hardship if forced to carry digital broadcast signals during the transition. As noted in the NPRM, "small cable operators may not be able to upgrade their systems, or invest in digital compression technology, due to financial constraints [which] thus, may delay their transition to digital."[49] The financial limitations of small cable operators and systems was the impetus behind development of

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[47]See Turner, 117 S. Ct. at 1197-98.

[48]Id. at 1198 (citations omitted).

[49]NPRM, ¶ 52.

HITS technology, a satellite-based system which allows cable operators to provide subscribers with up to six additional programming services on one channel in digitally compressed packets. HITS permits the provision of additional programming services without the need to undertake costly upgrades of systems that would put upward pressure on rates.[50] If channel-locked small cable operators and systems were required to carry digital broadcast stations during the transition period, they would be forced to eliminate existing services and could potentially lose the cost-saving benefits of HITS technology.

These burdens need not be forced upon *any* cable operator since they are not sufficiently tailored to further the government interests enunciated in Turner. In that case, the Supreme Court concluded that "[mandatory] carriage does not represent a significant First Amendment harm to either system operators or cable programmers because those stations were carried voluntarily before [the 1992 Cable Act]."[51] The present circumstances are inapposite since DTV is a nascent technology which has yet to be transmitted, let alone be *re*transmitted. As a result, the six carriage proposals set forth in the NPRM would not withstand judicial scrutiny since they each, in one form or another, require carriage of DTV signals before cable operators and broadcasters have had the opportunity to negotiate voluntary carriage. Previous experience has shown that it may not be necessary to enact transitional DTV must-carry rules, because most broadcasters may simply elect retransmission consent.[52] Indeed, this fact was acknowledged in the NPRM.[53] Thus,

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[50]NPRM, ¶ 24.

[51]See NPRM, ¶ 33

[52]Id. ("Approximately 80 percent of commercial television broadcasters elected retransmission consent on some cable systems, rather than must carry, during the 1993-1996

(continued...)

the Commission should simply preserve the *status quo*, allow voluntary carriage negotiations to occur, and see whether the pattern of choosing retransmission consent continues into the realm of digital broadcast stations.[54]

The Commission's present desire to promote the use of new digital technology is, in some ways, similar to its desire in the early 1960's to promote television broadcasters' use of UHF portions of the spectrum. Opening the UHF band to television broadcasting would greatly increase the number of possible television stations, since it was far larger than the 12-channel VHF band already in use. However, in 1962, the UHF portion of the spectrum was significantly underutilized, as evidenced by the fact that 93 percent of available UHF channel assignments were idle.[55] At that time, the public refused to purchase television sets capable of receiving UHF stations until there were such stations offering attractive programming. Concurrently, television broadcasters were reluctant to place UHF stations on the air because those stations' limited viewing audience made them unattractive to advertisers.[56] The Commission determined that to foster the growth of UHF television stations, television sets had to be capable of receiving UHF signals. Furthermore, the Commission concluded that the only "practical and effective means of

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[52](...continued)
election cycle.").

[53]Id. ("If [the success of private negotiations] is repeated, however, it is possible that many of the transitional issues involved in this proceeding will be resolved through retransmission consent.").

[54]See NPRM, ¶ 50.

[55]See S. Rep. No. 1526, 87th Cong., 2d Sess., 1962 WL 4679, *1 (1962).

[56]Id. at *4.

insuring that such receivers get into the hands of the public [wa]s to enact legislation" requiring the manufacture of such receivers.[57] Congress enacted a statute that required all television receivers shipped in interstate commerce or imported into the United States to be capable of adequately receiving all television channels.[58] The purpose of the statute was "to permit maximum efficient utilization of the broadcasting space, especially that portion of the spectrum assigned to UHF television."[59] Congress justified the All-Channel Receiver Act as an exercise of its authority under the commerce clause of the Constitution.[60]

The noteworthy aspect of this historical footnote is that Congress and the Commission responded to a problem that is essentially similar to the one that exists today with regard to digital broadcasting, and they responded to it with a solution that did not impinge on First Amendment rights. Today, an increasing number of television sets already have an input selection feature, a technology which is transparent to the user and would not be burdensome on cable operators' speech. The Joint Commenters expect that all digital television receivers will contain an input selection feature. To the extent that this expectation proves untrue, the Commission could decide to use its authority under the All-Channel Receiver Act to mandate the inclusion of this feature. Through deployment of this simple technology, all viewers, cable subscribers and non-subscribers alike, will enjoy unfettered ability to receive all digital television stations available off-air in their

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[57]Id.

[58]All-Channel Television Receiver Act, 47 U.S.C. §§ 303(s), 330 (1962).

[59]S. Rep. No. 1526, 87th Cong., 2d Sess., 1962 WL 4679, *2 (1962).

[60]See id. at *11.

area. Obviously, no broadcaster can legitimately expect to be viewed in areas where the broadcaster fails to deliver a signal.

Generally, under the current must-carry provisions, cable operators must carry each local broadcast station that desires carriage on the cable system serving that broadcast area.[61] Thus, cable operators already must provide channels for broadcast stations on their cable systems. Cable operators often cannot satisfy even their analog must-carry requirements with "unused" channels, much less satisfy analog *and* digital must-carry requirements. Consequently, at some point under six of the Commission's seven digital must-carry proposals, carriage of a broadcast television station will displace carriage of a cable programming network. Even if technological advances result in a greatly increased number of channels on cable systems, the number of programmers competing for carriage on those channels increases at an even faster rate. Thus, each time a cable channel is awarded to a broadcast station for its digital signal when its analog signal is already being carried, a cable programmer is denied a potential venue for offering its speech to cable viewers; and the diversity of sources providing information over the cable system is reduced. This result is directly contrary to the goals of the First Amendment.[62]

Moreover, where mandatory carriage of a broadcast station's digital, as well as analog, channel forces a cable operator to allocate more than one-third of its usable, activated channels to local commercial broadcast stations, the Commission's present must-carry rules allow the cable

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[61]See 47 U.S.C. § 534.

[62]See, e.g., Time Warner Entertainment, 93 F.3d at 975.

operator to choose which such stations shall be carried on its system.[63] If a cable operator with "excess" must-carry signals opted to eliminate the digital signals (a commercially reasonable choice), the Commission-identified goal of promoting the use of digital technology would not be served. On the other hand, if such a system elected to carry both the analog and digital signals of some broadcasters, while dropping the analog signal of other broadcasters entirely, this would undermine the goals of the analog must-carry rules upheld in Turner. Any government-imposed DTV must-carry regulations that mandate cable carriage of both a digital and an analog signal of the same broadcast station would, therefore, not be sufficiently tailored to further the government's interests, even assuming those interests are ultimately deemed "important."

IV. The Resolution of Digital Compatibility Issues Is A Prerequisite To The Imposition Of Any Mandatory Carriage Obligation.

The NPRM states "that ... participation by the cable industry during the transition period is likely to be essential to the successful introduction of digital broadcast television."[64] However, unless a resolution of outstanding compatibility issues is achieved in a way which reduces the cost to subscribers of converting DTV signals for viewing on analog receivers, mandatory carriage during the transition period will do little to facilitate the move from analog to digital broadcasting. "The introduction of DTV, and any carriage rules [it] may implement, will be most successful if all the components of the transmission path work together."[65]

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[63]47 U.S.C. § 534(b)(2).

[64]NPRM, ¶ 14.

[65]NPRM, ¶ 17.

A. The success of digital television is more dependent on consumer investment in new technology than on mandatory carriage.

The success of broadcast television's transition from analog to digital depends greatly on the willingness of consumers to invest in receivers or terminal devices which will enable them to view DTV programming. Regardless of whether consumers subscribe to cable television services, DTV conversion will involve significant transitional costs. The entire viewing public will need to purchase expensive digital receivers or converters allowing them to view DTV signals on their analog receivers. The public's willingness to make this investment, more than any other factor, will determine the success and timing of the transition from analog to digital broadcasting.

Attempts to shift the cost of this transition to the cable television industry will only anger its subscribers and impede the growth of DTV. Cable subscribers with cable-ready analog receivers will need to purchase or lease a new set-top box in order to watch DTV programming on their analog receiver. Subscribers without cable-ready analog receivers or subscribers to premium services will need either a second set-top box to convert digital cable signals for viewing (in addition to their current decoder box), or a new box capable of both conversion and decoding functions. Even subscribers who purchase the digital receivers currently on the market will need an additional box to convert quadrature amplitude modulation ("QAM") signals to vestigial sideband modulation ("VSB") signals since the first generation of digital receivers will not be capable of translating cable-delivered QAM modulated signals. Further, these receivers may not even allow for the display of HDTV programs in HDTV format as retransmitted by cable systems due to the absence of a "Fire Wire." Not only will these subscribers be angered at being essentially forced to purchase more equipment, they will be even more upset when channel-locked

cable operators must remove cable programming in favor of digital broadcast stations which will substantially duplicate programming from their analog counterparts. This anger could prevent or delay cable subscribers from purchasing digital reception equipment and retard DTV's growth during the transition period. Thus, the characterization of must-carry rules as "essential" to the development of DTV represents an attempt to shift the financial and technological burdens associated with the transition period onto cable subscribers.

B. The creation of industry standards for digital receivers will serve the public interest and must precede the imposition of must-carry requirements.

The Commission has thus far declined to set forth rules standardizing digital broadcast receivers.[66] As a result, the consumer electronics industry has designed the first generation of digital broadcast receivers to display broadcast transmissions using VSB,[67] a format incompatible with the QAM standard adopted in 1994 by the cable television industry for headend to subscriber transmissions.[68] In order to ensure that consumers receive the highest quality digital broadcast and cable television services, equipment manufacturers must develop receivers and terminal equipment capable of processing both VSB and QAM modulated signals. Another missing component from first-generation DTV receivers will be an input jack for the IEEE-1394 "Fire

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[66]Fifth Report and Order, ¶ 112; NPRM, ¶¶ 29, 31.

[67]Broadcasters chose the less efficient VSB modulation since this mode minimizes transmission errors and data loss in an over-the-air environment. NPRM, ¶ 22.

[68]Letter from Decker Anstrom, President and Chief Executive Officer, National Cable Television Association to William Kennard, Chairman, Federal Communications Commission (Aug. 26, 1998). The QAM format was chosen by the cable industry because 64 QAM and 256 QAM modes efficiently transmit data at a higher rates where over-the-air impediments do not exist, allowing cable operators to provide enhanced services to their customers. NPRM, ¶ 22.

Wire."[69] As a result, many enhanced cable services will be unavailable to consumers who purchase first generation DTV receivers.

Regardless of whether any must-carry obligations are imposed upon cable operators, consumers should have, and will likely demand, the ability to choose between off-air and cable reception of DTV signals as they do today with analog television. Digital receivers and terminal equipment must also possess an open architecture which supports software-based applications and uses a standard interface so that MVPDs can offer consumers a full range of enhanced services. Without these standard features, consumers will be unlikely to invest in digital receivers and terminal equipment, effectively stunting the growth of the DTV market during the transition period. As a result, the entire viewing public will need to make a substantial investment in digital technology in order to receive DTV. The public's willingness to make this investment, more than any other factor, will determine the success of the transition from analog to digital broadcasting.

V. Retransmission Consent Is Preferable To Must-Carry As A Means Of Facilitating The Transition to Digital Television.

The Commission's stated goals in the present NPRM include:

> [T]he successful introduction of digital broadcast television and the subsequent recovery of the vacated broadcast spectrum . . . a minimization of the disruption and costs to subscribers, cable operators and cable programmers, while not inhibiting investment and innovation in technologies and services. . . . Overall, we want an efficient and orderly structure that implements the law in a manner that, to the extent possible, permits market forces and private agreements to resolve issues . . . .[70]

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[69]Letter from Senator John McCain, Chairman, Senate Commerce Committee, to Gary Shapiro, President, Consumer Electronics Manufacturers Association (July 15, 1998).

[70]NPRM, ¶ 1.

Retransmission consent is the only statutorily prescribed means by which the Commission can achieve all of these goals. When compared with must-carry and its inherent practical limitations, retransmission consent is best suited to advance the transition to DTV while allowing marketplace forces to minimize the cost to cable subscribers and operators.

A. Carriage of digital broadcast stations during the transition period pursuant to retransmission consent is statutorily permissible and will accelerate the transition to digital television.

Unlike Section 614(b)(4)(B) of the Act, which does not give must-carry rights to digital signals during the transition, the Act's retransmission consent provisions apply to commercial "television broadcast stations" generally without any limitation.[71] Thus, both digital and analog television stations are free to obtain carriage on cable systems by private contractual arrangement during the transition period.

Allowing digital television stations and cable operators to negotiate the terms of their retransmission consent agreements will provide them with incentives to accelerate the transition to digital broadcasting. Cable operators might perceive an advantage to reaching retransmission consent agreements earlier in the transition period where digital broadcasters allow the cable operators to retransmit in more bandwidth-efficient digital formats that differ from the original broadcast. Where DTV stations do not continuously transmit digital programming or simulcast their analog programming, changes in the Commission's rules against "cherry picking"[72] would allow cable operators to create composite digital cable channels or, in some cases, replace duplicative analog programming with its digital counterpart without having to delete existing

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[71] 47 U.S.C. § 325(b)(3)(A).

[72] 47 C.F.R. § 76.62.

cable network programming.[73] In cases where broadcasters are initially unable to arrange for retransmission of their digital signal, such broadcasters will likely promote the purchase of digital receivers and off-air antennas in an effort to generate consumer awareness regarding DTV and create a market for their programming. Given these types of incentives, cable operators and digital broadcasters will likely achieve a high rate of digital broadcast retransmission on mutually agreeable terms through the negotiation of private retransmission consent agreements.

B. Mandatory carriage of digital broadcast stations during the transition period is impractical and infeasible.

The imposition of must-carry requirements before broadcasters have completed their conversion from analog to digital transmission is antithetical to the very notion of a "transition period." Rather than convert the programming on their current analog channel to digital format, broadcasters are being given free use of a second channel by the government on which they will eventually simulcast in DTV mode as a means to transition from analog to digital. Cable systems are not being given any additional bandwidth by the government to accommodate the carriage of DTV stations during this period.

The move from analog to digital in television broadcasting is just one of many ongoing transformations involving communications media. Recorded audio and video media, as well as the consumer electronics devices used to listen and/or watch them, have been evolving over the

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[73]NBC, CBS and Fox plan to begin broadcasting a limited amount of programming in HDTV this November. Glen Dickson, "CBS to broadcast NFL in HDTV," Broadcasting and Cable, October 5, 1998, at 6. It remains unclear whether DTV network affiliates will broadcast SDTV programming throughout the remainder of their daily schedules. To the extent that certain stations do not transmit any digital programming or simulcast their analog programming, a relaxation of the "cherry picking" prohibition would be of benefit to cable operators by allowing them to maximize use of their system capacity.

past few years to the point that they largely operate in a digital environment. However, that does not mean that analog media have become obsolete. Just as compact discs and laser discs have not completely displaced the market for audio cassettes and videotapes, DTV will not immediately eliminate the use of analog television receivers. Consumers have made a substantial investment in analog receivers, many of which have useful lives which exceed 5 to 15 years. During the transition period and even after its conclusion, consumers will seek to maximize the usefulness of their analog receivers through the use of set-top boxes.[74]

When crafting its digital broadcast carriage rules, the Commission should keep this environment in mind and design rules which will accommodate and facilitate the changes already in progress in the marketplace. As FCC Chairman William Kennard recently noted in a speech to the International Radio and Television Society:

> The transition to digital TV is inevitable, but the pace of the transition will be set by the private sector. And we in government should not set up the industry for failure by creating false expectations or, worse, micromanaging what you should do with this promising technology.[75]

To this end, the Commission should not impose digital must-carry requirements on cable operators during the transition period. Carriage rules during the transition period should instead be structured to provide cable operators with incentives to upgrade their plant and retransmit digital signals, whether obtained from broadcast or non-broadcast sources, where economically justified. Such incentives could include, among others, exemptions from syndicated exclusivity, network nonduplication and sports blackout rules for digital broadcast stations or a relaxation of

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[74]Fifth Report and Order, ¶ 114.

[75]FCC Chairman William Kennard, Remarks before the International Radio and Television Society (Sept. 15, 1998).

the prohibitions against the "cherry picking" of local stations for cable systems carrying digital broadcast signals. The following discussion highlights several issues raised by the transition from analog to digital mode which have been implicated in this proceeding, and indicates where applicable the potential incentives which the Commission could offer cable operators in order to facilitate the transition from analog to digital broadcasting.

1. Small Cable Systems

As discussed, *supra*, in Section III.B, small cable systems, particularly those owned by small cable operators, would face severe financial hardship if forced to carry digital broadcast signals during the transition period. The Commission should give small cable systems and their operators every possible incentive to assist their voluntary carriage of digital broadcast stations during the transition period.[76]

2. Capacity

Current FCC rules require cable systems with more than 12 activated channels to dedicate "up to one-third of the aggregate number of usable activated channels" to the carriage of local commercial broadcast signals.[77] However, capacity can no longer be defined in terms of "usable activated channels" as it has been with analog systems since in a digital environment up to eight different services can be multiplexed over a single 6 MHz band. For example, within the same 6 MHz of digital spectrum, one cable operator might transmit two HDTV services in 720p format,

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[76]Despite the fact that such action would be unconstitutional and beyond the Commission's jurisdictional power, if the Commission ultimately decides to implement some sort of transitional digital carriage rules, in no event should small cable systems and their operators be held subject to them.

[77]47 U.S.C. § 534 (b)(1)(B).

whereas another could provide its subscribers with eight digitally compressed services. Each cable operator could arguably be considered to have one "usable activated channel" because each is using 6 MHz of spectrum. Alternatively, each service multiplexed over the 6 MHz of spectrum could be deemed a channel, giving the cable operators two and eight channels, respectively. The "usable activated channels" definition of capacity is clearly unworkable in a digital context, a fact which further illustrates the inapplicability of the current must-carry rules to the retransmission of digital broadcast stations.

Despite this ambiguity, broadcasters argue that the current definition of capacity is workable if you assume that cable operators will compress and multiplex all existing analog services on individual 6 MHz bands.[78] This would give each cable operator *seven times* the "usable activated channels" they currently possess and substantially increase the number of channels available for must-carry purposes. However, this argument ignores the fact that nowhere in the Communications Act are cable systems required to digitize their existing analog services. The cable television industry and its subscribers should not be forced to subsidize the broadcast television industry's transition from analog to digital, particularly when cable operators are being asked to carry duplicative digital broadcast signals. If broadcasters want retransmission of their digital programming during the transition period, they can enter into private agreements with cable operators who are willing to deploy digital capacity where commercially practicable arrangements have been achieved with the affected broadcasters.

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[78] NPRM, ¶ 58.

3. Material Degradation

Closely related to the issue of capacity is the question of what constitutes the material degradation of a digital broadcast signal. In the analog context, cable operators are required to retransmit the signal of local television stations without material degradation.[79] Broadcasters have argued for an extension of this requirement to cover situations where a cable operator alters the original broadcast format of a digital service.[80] So long as high-definition broadcast signals are retransmitted in 1080i or 720p line format (*i.e.*, a signal broadcast in 1080i format could be retransmitted in either 720p or 1080i line format), the alteration of a broadcast signal's digital format does not constitute material degradation. Rather, it grants cable operators the flexibility to maximize their system capacity by efficiently allocating and multiplexing different services within their digital spectrum. If cable operators are given this type of flexibility, they will have more incentive to carry digital broadcast stations and, as a result, are likely to negotiate retransmission consent agreements sooner rather than later during the transition period.

4. Tier Position

Another way in which the Commission can promote the conclusion of retransmission consent agreements during the transition period is to give cable operators the flexibility to choose the tier position of digital broadcast signals. Under current rules, all broadcast stations (other than superstations) must be placed on the basic tier and included within the basic service rate

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[79]47 U.S.C. §§ 534(b)(4)(A), 535(g)(2).

[80]NPRM, ¶ 64.

charged subscribers.[81] However, a different standard must apply to those digital broadcast stations which are retransmitted during the transition period. A large percentage of cable subscribers will be unable to view digital programming until late in the transition period due to the high cost of digital television receivers and terminal equipment. If cable operators are forced to place voluntarily carried digital broadcast stations on the basic tier during the transition period, these subscribers will be saddled with higher basic service rates for programming they cannot view in full HDTV format. The majority of cable subscribers will thus be effectively subsidizing the small percentage of households able to afford DTV equipment.

When the 1992 Cable Act required carriage of the "broadcast signals" of a television station on the basic service tier, the only existing "broadcast signals" were analog.[82] Therefore, if each broadcast licensee's analog and digital facilities are considered to be a single television station, carriage of the analog signal on a cable system's basic tier should be found to satisfy Section 543(b)(7)(A)(iii). Cable operators should be allowed to create a separate digital tier which could be purchased as an accompaniment to analog basic service for an extra fee. By requiring the purchase of analog basic service for digital tier customers, cable operators will be able to avoid questions of cost recovery subsidies, satisfy any existing franchise requirements relating to the carriage of analog PEG channels on the initial service tier, and resolve the technical problems inherent in combining analog and digital services on the same tier, without causing any disruption to a broadcaster's existing audience.

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[81] 47 U.S.C. §§ 534(b)(7); 543(b)(7)(A)(iii).

[82] 47 U.S.C. § 543(b)(7)(A)(iii).

5. Input Selector or A/B Switch

In the 1992 Cable Act, Congress rejected the use of input selector (or A/B) switches as a surrogate for the mandatory carriage of local broadcast stations based upon its finding that "an A/B switch is not an enduring or feasible method for the reception of television signals."[83] At the time, many cable subscribers did not have off-air antennas, rendering an A/B switch useless. For those subscribers able to receive broadcast stations off-air, the mechanical A/B switches then available were inexpensively manufactured, unreliable and confusing for consumers to install and use. Often, improperly installed switches resulted in signal leakage.

These criticisms no longer apply in the digital context. Today's electronic input selector functions are increasingly common features in television receivers, video cassette recorders ("VCRs") and cable customer premises equipment. Television viewers can readily shift between cable services, off-air reception or their VCR by using their remote control. Electronic input selectors are also reliable since they are manufactured to meet the high technical standards set forth by the Commission in its cable equipment compatibility proceeding.[84] Given the wide availability and reliability of electronic input selectors, there is no need for a mandatory DTV carriage requirement.

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[83]NPRM, ¶ 87.

[84]Consumer Electronics Order, supra note 70. If digital television receivers do not contain remote-controlled input selection functions, the Commission could ensure that cable subscribers have easy access to the off-air reception of DTV stations by requiring consumer electronics manufacturers to include them in all digital receivers under the All-Channel Television Receiver Act. See supra, part III.B.

6. Antennas

Pursuant to Section 207 of the Act, the Commission has adopted rules which preempt local governmental and private restrictions impeding the installation, maintenance or use of rooftop antennas for the reception of television broadcast stations.[85] These rules have allowed many consumers to install antennas where they were previously not able to do so. Indeed, the DBS industry has campaigned extensively to raise public awareness about direct off-air reception of television broadcast stations though the use of outdoor antennas and input selectors. The widespread ability of consumers to receive broadcast television signals off-air through the use of antennas further illustrates that must-carry requirements have become obsolete in the digital era.

7. Impact on Rate Regulation

In order to encourage cable operators to begin the voluntary carriage of digital broadcast stations during the transition period, the Commission should provide them with rate incentives. For example, the Commission could allow cable operators who develop a new digital broadcast tier to charge an unregulated rate for that tier.[86] This type of approach would allow cable operators to recover their costs without forcing their analog basic service subscribers to subsidize what will initially be a small number of digital broadcast subscribers.

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[85]47 C.F.R. § 1.4000.

[86]In an analogous context, the Commission forbears from the rate regulation of new product tiers. 47 C.F.R. § 76.987.

VI. Conclusion

For all of the reasons set forth above, the Commission should not adopt any must-carry regulations for DTV signals that would apply during the transition period.

Respectfully submitted,

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Dated: October 13, 1998
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